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IN THE

Supreme Court of the United States

October Term, 1958

No. 437

MARVIN RUBIN,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE PETITIONER

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Opinion Below

The opinion of the Court of Appeals (R. 80-86) is reported at 258 F. 2d 9.

Jurisdiction

The judgment of the Court of Appeals was entered on August 11, 1958. The petition for a writ of certiorari was filed on October 10, 1958 and was granted on December 8, 1958.

The jurisdiction of this Court is invoked under the provisions of Title 28 U. S. C. Section 1254.

Constitutional Provisions and Statute Involved

Amendment V to the Constitution of the United States provides:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation."

Amendment VI to the Constitution of the United States provides:

> "Rights of the accused.—In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

Section 3500, Title 18, United States Code provides:

> "§ 3500. Demands for Production of Statements and Reports of Witnesses.
>
> (a) In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) to an agent of the Government shall be the subject of subpoena, discovery, or inspection until said witness has testified in direct examination in the trial of the case.

(b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.

(c) If the United States claims that any statement ordered to be produced under this section contains matter which does not relate to the subject matter of the testimony of the witness, the court shall order the United States to deliver such statement for the inspection of the court in camera. Upon such delivery the court shall excise the portions of such statement which do not relate to the subject matter of the testimony of the witness. With such material excised, the court shall then direct delivery of such statement to the defendant for his use. If, pursuant to such procedure, any portion of such statement is withheld from the defendant and the defendant objects to such withholding, and the trial is continued to an adjudication of the guilt of the defendant, the entire text of such statement shall be preserved by the United States and, in the event the defendant appeals, shall be made available to the appellate court for the purpose of determining the correctness of the ruling of the trial judge. Whenever any statement is delivered to a defendant pursuant to this section, the court in its discretion, upon application of said defendant, may recess proceedings in the trial for such time as it may determine to be reasonably required for the examination of such statement by said defendant and his preparation for its use in the trial.

(d) If the United States elects not to comply with an order of the court under paragraphs (b) or (c) hereof to deliver to the defendant any such statement, or such portion thereof as the court may direct, the court shall strike from the record the testimony

of the witness, and the trial shall proceed unless the court in its discretion shall determine that the interests of justice require that a mistrial be declared.

(e) The term 'statement,' as used in subsections (b), (c), and (d) of this section in relation to any witness called by the United States, means—

(1) a written statement made by said witness and signed or otherwise adopted or approved by him; or

(2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness to an agent of the Government and recorded contemporaneously with the making of such oral statement. Added Publ L. 85–269, Sept. 2, 1957, 71 Stat. 595."

Questions Presented

(1) Whether the trial court committed reversible error in ruling during cross-examination of the first important Government witness that as prerequisites to the securing of an order from the court directing the prosecutor to produce for defendant's inspection existing and relevant previous statements of Government witnesses, defense must show inconsistency between the testimony of the witness and the contents of statements sought to be produced and moreover that such inconsistency must even be shown by defense counsel to exist as a prerequisite to securing the court to read the statements to determine if any such inconsistency exists.

(2) Whether the Court of Appeals was correct in designating the trial court's concededly erroneous ruling as "harmless error" because of the enactment of the supervening statute enacted by Congress (18 U. S. C. Sec. 3500(a)(b)(e)(1)(2)) as an aftermath of the decision of the Supreme Court of the United States *in Jencks* v. *United States* (353 U. S. 657).

(3) Whether the Court of Appeals was empowered to accept and predicate its decision on an examination in camera of a sealed summary of the prior statement of a Government witness furnished to it by the prosecution and of an ex parte affidavit pertaining to the summary, to determine whether the summary is discoverable under the provisions of Title 18 U. S. C. Section 3500, when the summary was not part of the trial record, and when no claim was asserted that the said summary contained irrelevant or extraneous matter.

(4) Whether the Court of Appeals erred in completely disregarding the contention of petitioner herein that the admitted error of the trial court, as clearly enunciated in the *Jencks* case, applied not only to the first Government witness as to whose testimony the production of a previous statement was refused but also to all the subsequent witnesses who were not asked about such statements because of the trial court's emphatic exposition of his erroneous concept of the doctrine announced by this Court in *Gordon* v. *U. S.* (344 U. S. 414).

(5) Whether Title 18 U. S. C. A. Section 3500 is unconstitutional on its face and as applied by the Court of Appeals herein and even if it is otherwise constitutional whether the Court of Appeals erred in its interpretation and construction.

(6) Whether Section 3500 is *Ex Post Facto* Legislation as applied to appellant.

Statement of Case

As an aftermath of a full-dress U. S. Senate Committee investigation complete with all the publicity and television trappings with which the nation has been regaled in recent years, the petitioner herein, together with eight other persons was charged in an indictment with a conspiracy to de-

fraud the United States Government in violation of Title 18 U. S. C. Sec. 371. The said petitioner was also charged in the second and third counts of the indictment with bribery in violation of Title 18 U. S. C. Sec. 201. Upon motion of the prosecution, a severance was ordered of the trial of three of the named defendants, including one, Joseph G. Porreca, a Government inspector who pleaded guilty and testified as a prosecution witness.

After a lengthy trial (six weeks), the jury rendered a verdict of guilty as charged against all the defendants except that petitioner and defendant David Pollack, a Government employee, who was charged in the second count of the indictment with accepting a bribe proffered by petitioner, were acquitted of the charges contained in the said second count. Petitioner was convicted under the first and third counts. The verdict of the jury included a request on the part of the jury for clemency as against all defendants. On May 15, 1957, petitioner was fined $1,000 on Count One of the Indictment and sentenced to fifteen months imprisonment on each of Counts One and Three, the same to run concurrently.

The offenses of which the defendants were convicted were alleged to have been committed in connection with procurement contracts for garrison hats for the U. S. Army Quartermaster Corps and white sailor hats for the U. S. Navy. The white hats were manufactured in Puerto Rico. The defendants were all men of previously unimpeachable honesty and integrity. Not one had ever been convicted or even accused of any previous offense. The principal Government witness was Leon Levy, an unindicted accomplice, who glibly and fearlessly testified to having participated in the commission of many crimes during his tenure of occupancy of the witness chair. He was shown to be a former business associate of defendants Rubin and Ades embittered because he had not been included in the subsequent business activities of his erstwhile associates.

The testimony of the defendant Porreca, the Government inspector who pleaded guilty prior to the trial and testified for the prosecution, was without doubt the evidence which tipped the scales against the defense. In his testimony before the Senate Committee and during the trial, he perjured himself almost endlessly. He frankly admitted he had perjured himself before the Senate Committee on cross-examination. For his assistance to the prosecution, he won a suspended sentence.

Both Leon Levy and Porreca had undoubtedly given and signed statements to several federal law enforcement agencies. Such statements would have been invaluable to defense counsel on cross-examination of these two self-confessed rogues. Request was not made for such statements because of the emphatic ruling of the trial Judge Hon. Irving Kaufman during the testimony of the first real witness called by the prosecution after some introductory testimony by an expert witness.

At the first opportunity, after the direct testimony of this witness, Melvin Carlin, an accountant, Mr. Rubin's counsel, Mr. John T. Sullivan, inquired whether a statement had been given by the witness to any Government Investigator (R. 46).[1]

After receiving an affirmative reply that such a statement had been given to investigators for the United States Senate Committee, demand was made for the production of the same. The following colloquy between Court and Counsel then ensued (R. 46):

> "Mr. Sullivan: If the Court please, I ask for the production of that statement.
>
> Mr. Christy: No proper foundation for that, your Honor.
>
> The Court: I don't think you have laid any foundation merely by asking if a statement was given.

[1] References in this form are to the Transcript of Record.

Mr. Sullivan: What was your ruling, if your Honor please?

The Court: I don't think you have laid sufficient foundation for the production of the statement?

Mr. Sullivan: I would ask the Court to look at the statement to see if there are any inconsistencies?

The Court: I don't think you have even laid a foundation for that."

Immediately thereafter, in questioning the witness concerning a most important document, a $1000 check, the proceeds of which it was contended by the Government was given to Rubin for alleged payoffs, the witness testified as follows (R. 48):

"Q. Did you tell Mr. Poole and Mr. Balaban on your meeting with them the first time the Government agents talked to you that you had put that check under the category of 'Entertainment'? A. I posted it, yes.

Q. You posted it in the books yourself? A. Yes, I posted it myself.

Q. Now, did you tell Mr. Poole and Mr. Balaban that it was you who posted it under the category 'Entertainment'? A. I don't know whether I did or didn't. It is in my handwriting. If they asked me, I must have surely said that I did.

Q. When you posted that thousand dollars under the category 'Entertainment', had you looked at the checkbook of Bonita Originals, from which this check had been taken? A. Yes."

Thereafter the stub of the checkbook was put in evidence by counsel for Rubin as defendants' exhibit and the witness gave the following testimony (R. 49):

"Q. Mr. Carlin, when you made the entry of one thousand dollars, did you observe that checkbook which said that the check 2213 was an exchange? A. I did."

Thus the Government witness, a certified public accountant, was forced to admit he had made a false entry in the company's books.

Thereafter further demand was made for the statement as follows (R. 74):

> "Mr. Sullivan: If the Court please, may I address you?
>
> If your Honor please, according to the case of Gordon v. United States, 344 U. S. 414, it was my understanding having to do with the prior statement that I asked to be furnished to me, that was given to Balaban and Poole, it was my understanding that if I can tell your Honor of a specific statement, that then the rule is that you see the statement and observe if there is any inconsistency, and if there is any inconsistency, and if there is, you give it to me; am I mistaken in that?
>
> The Court: That is substantially correct.
>
> Mr. Sullivan: Well, I did ask for the specific statement given to Balaban and Poole.
>
> The Court: I know, but you didn't point out that there was any inconsistency. That is the obligation.
>
> Mr. Sullivan: I don't have to, as I understand it.
>
> The Court: Oh, yes, you do. You must at least indicate to me something that makes it appear that there might have been something inconsistent in that statement. Then I would read it over. But there wasn't the slightest indication. As a matter of fact, everything you brought out indicated that it was consistent. The mere request doesn't make it necessary for me to look at it. Otherwise the Court would be busy all day long looking at every possible document that had anticipated the case. You may show something inconsistent, because that is the only purpose upon which you could use it, or at least something that tends to make us believe that there was something inconsistent, and then the Court has an obligation to look at it.
>
> I am familiar with the entire line of cases."

Thus the Court once and for all the purposes of this trial made the far reaching ruling which effectively limited and hamstrung all defense counsel on cross-examination, exceptionally vital in this case, which turned for the most part on relatively uncorroborated verbal assertions of Government witnesses. Had counsel been able to secure the

production of previous statements by Carlin, Levy, Porreca and the other Government witnesses, the defendants might very well have been able to secure a verdict of acquittal from the jury. It is most significant that the jury during the course of its deliberations asked that the cross-examination of Carlin be read again and eventually recommended leniency after first inquiring whether leniency could be secured through them. The length of time they remained in session and their many requests for instructions all denoted a doubtful and troubled attitude on their part.

The Court made its ruling so clearly that subsequent requests for such previous statements of witnesses might very well have been deemed offensive and contumacious in the presence of the jury. If the Court had ruled properly on the law as enunciated in *Gordon* v. *United States, supra,* after counsel had expressly referred to the case, then, of course, subsequent requests for all such statements would have been in order. In such circumstances, counsel is certainly not required to indulge in repetitious requests and objections.

The Court's attention is called to the fact that the case at bar contains other manifestations of an erroneous conception on the part of the trial court as to the right of the defense to statements and documents in the possession of the Government. There were at least two matters of the same nature which were accorded the same treatment by the Trial Court. The witness Levy utilized a memorandum in Arabic to refresh his recollection. This was, of course, made available to defense counsel for their inspection but there were other memorandums or diaries also in Arabic which were in the possession of the prosecution which were not produced although counsel for the defense had in effect requested that they be turned over to defense. The colloquy between the Court, Mr. Christy and Mr. Gould, counsel for defendant Lev (CA 55-57)[2] amounts to a request for these

[2] References in this form refer to the certified transcript of record in the Court of Appeals.

diaries and a refusal by the Court at the time of the request to turn them over. The Court stated as follows:

> "The Court: Very well, that apparently is it at the present time. There will be no direction 'now to turn' over all of them. If during the course of the trial it becomes apparent the other notes are important, then I will rule on it at that time." (The stenographer's minutes read "out of turn" but obviously the Court said "now to turn".)

The Court further stated (CA 53):

> "The Court: Whether or not you will be able to see any other part of the notes is another problem.
> Mr. Gould: Will depend on the state of cross-examination.
> The Court: That is correct.
> Mr. Gould: Very well, sir. I understand it very clearly.
> The Court: That will depend upon the state of the law."

Necessarily the request of counsel for the other Arabic notes utilized in the Senate investigation was based on even stronger and more compelling grounds than the request for Carlin's statement. Under no conceivable rule of governmental privilege could the Court have refused to direct the turning over of these memos or even to have deferred ruling on same.

The same pattern was followed as to the minutes of the Senate Committee. The record of the public sessions in book form was distributed throughout the country to anyone asking for them; but the minutes of the closed or executive sessions were not made available to defense counsel. On the occasion when the Government made an offer of proof as to the testimony of defendant Pollack before the Senate on the theory of consciousness of guilt the Assistant District Attorney stated as follows (CA 59-60):

> "We have provided defense counsel, at least Mr. Carroll, with a copy of the *Executive Testimony* of

> David Pollack from which testimony we wish to introduce certain parts, * * *." (Emphasis supplied.)

Thereafter Mr. Carroll, counsel for Pollack, stated:

> "Mr. Carroll: I have examined the seven pages of *selective quotation* which Mr. Christy submitted to us at the close of the last session, * * *." (Emphasis supplied.)

Apparently the Government did not even furnish the full context of the portions of the executive testimony from which they proposed to read excerpts. It is submitted that these prejudicial actions of the prosecution stemmed from the original ruling of the trial court during the Carlin testimony.

Of course there cannot be the slightest doubt that under the doctrine of *Jencks* v. *United States, supra,* decided shortly after this trial ended, the conviction of Rubin on both counts would have been reversed had it not been for the supervening enactment of Title 18, U. S. C., Sec. 3500 (a)(b)(c)(1)(2). In this connection, the opinion of Chief Justice Clark of the Court of Appeals stated as follows:

> "* * * Since the decision in Jencks v. United States, 353 U. S. 657, we know that the trial judge was in error in refusing the order on the ground that the defendants had not established inconsistencies between the statement and the witness' testimony. But before a new trial is to be ordered, we must see if the statement is in any event discoverable. * * *" (R. 85)

Thereafter the distinguished Chief Judge asserted that the United States Attorney had furnished the Court in a sealed envelope from the Senate Commitee, a Senate investigator's summary of an interview with the witness Carlin, accompanied by an affidavit which, to use Judge Clark's word "establishes" that the summary submitted is the only written record made of Carlin's interview and that it was written following the interview and is not a substantially verbatim record of Carlin's statement.

Judge Clark then goes on to state that while defendants "may perhaps" have been given a right to inspect a statement of this nature by the Jenck's decision, the recent codification of discovery on this situation would not allow petitioner the right to examine the investigator's summary on a new trial and therefore the error is rendered harmless by the supervening statute.

There is not a single word in the opinion of the Court of Appeals which in any way disposes of the petitioner's contention that his defense was hampered and prejudiced from that point forward by the trial court's error which the Court of Appeals apparently holds would have required a reversal as to Rubin were it not for the enactment of the new Statute.

A consideration of the foregoing excerpts from the record of the trial will demonstrate beyond any doubt to anyone even casually familiar with Government investigative agencies and procedures that regardless of whether the Senate investigator or the witness Carlin is telling the truth as to the existence of a statement signed by Carlin, there are statements in existence as to other and more important Government witnesses which will certainly prove to be relevant and inconsistent with trial testimony judged by any standard and therefore available to petitioner under the new Statute on a second trial.

Moreover, the Court of Appeals in reaching out beyond the record of the trial as to the statement of the witness Carlin did not carry this concept of appellate procedure to its logical ultimate and insist that prior statements respecting the testimony of all government witnesses be furnished to them in their deliberations for consideration and comparison with the trial testimony of such witnesses to ascertain whether any of such statements would have been discoverable under the new statute.

Summary of Argument

(1) The trial court's ruling as to the production of existing previous statements of Government witnesses constituted reversible error.

(2) The Court of Appeals erroneously interpreted Section 3500, Title 18, U. S. C. in its decision.

(3) The Court of Appeals lacked authority to predicate its decision on documents which were not part of the trial record.

(4) The Court of Appeals erred in completely disregarding petitioner's contention that the trial court's conceded error applied to all Government witnesses, even though production of previous statements as to them was not requested.

(5) Title 18, U. S. C., Section 3500 is unconstitutional on its face and as interpreted by the Court of Appeals herein.

(6) Section 3500 is Ex Post Facto legislation as applied to Appellant.

I

The trial court committed reversible error in ruling during the testimony of the first important government witness that previous statements of government witnesses shown to be in existence need not be produced unless defense counsel demonstrated an inconsistency between the testimony given by the witness on direct testimony and the contents of the statement sought to be produced.

The initial testimony in this lengthy trial was furnished by witness Rooney as an expert on procurement regulations and procedure; but the trial really started with the testimony of Melvin Carlin, a former accountant for

the Bonita Originals Company, which was owned by defendant Maurice Ades and government witness Leon Levy. Carlin furnished the cornerstone of the Government case. He was a most important prosecution witness.

On cross-examination by trial counsel he was asked the questions set forth above under Statement of the Case and the ruling complained of was made by the Trial Judge as likewise indicated hereinbefore. It is most important to understand that this ruling was made virtually at the outset of the prosecution's case at the first opportunity presented to counsel to do so and the Court once and for all the purposes of this trial made the far reaching ruling which effectively limited and hamstrung all defense counsel on cross-examination, exceptionally vital in this case which turned for the most part on relatively uncorroborated verbal assertions of Government witnesses. Had defense counsel been able to secure the production of previous statements by Carlin, Levy, Porreca and other prosecution witnesses the defendants might very well have been able to secure a verdict of acquittal from the Jury. It is significant that the Jury during the course of its deliberations requested that the cross-examination of Carlin be read to them and eventually recommended leniency, after first inquiring from the Trial Judge whether leniency could be secured through them. Additionally, the length of time they remained in session and their many requests for instructions all denoted a doubtful and troubled attitude on their part. The denial of production of these statements and the consequent limitation of cross-examination improperly imposed, could certainly never be categorized as "harmless error" in this close case.

In any event there can be no doubt that the court's ruling constituted reversible error under the doctrine of *Jencks* v. *United States, supra;* but absent this Court's decision in the *Jencks* case, which was handed down about

one month after the verdict of the jury herein, it is respectfully submitted that the trial court was completely in error in ruling that defense counsel were under an obligation to point out an inconsistency between the statement sought and the direct testimony of the witness as a prerequisite even to securing the reading of the statement by the court. *Gordon* v. *United States, supra.* See also *United States* v. *Andolschek,* 142 F. 2d 503; *United States* v. *Beekman,* 155 F. 2d 580; *United States* v. *Reynolds,* 345 U. S. 1, 97 L. Ed. 727; *United States* v. *Krulewitch,* 145 F. 2d 76.

The writer as trial counsel who carried the heaviest burden during this lengthy muliple-defendant conspiracy trial, as the record of the trial will well demonstrate, finds himself at a loss for words to adequately describe the devastating consequences to the defense which ensued as a result of this ruling. The error permeated and tainted the entire trial from that point forward. It was never doubted by defense counsel that all Government witnesses had each supplied numerous and conflicting statements to the various law enforcement and investigative arms of the Government in this widely publicized situation. When the court announced its ruling that it would be necessary to demonstrate an inconsistency before the court would even look at a document, it is putting it mildly to state that consternation filled the hearts of the various veteran counsel for the defense in contemplating how to devise a means to show an inconsistency in a paper no one had seen or could ever see.

The conviction of Rubin ought to have been reversed by the Court of Appeals under the above cited authorities even without reference to the *Jencks* case which preceded the latter. The subsequent enactment of Title 18, U. S. C. Section 3500 did not cure the vice in the court's erroneous ruling because under the provisions of that statute it would have been mandatory for the court to order the production of the prior statement in the circumstances presented at the trial.

II

The Court of Appeals erroneously interpreted Section 3500, Title 18 U. S. C. in holding that the trial court's conceded reversible error became "harmless error" because of the enactment of this supervening statute.

Even the limited clues we have as to the substance of the report agents Balaban and Poole of the Senate Permanent Subcommittee on Investigations, the so-called McClellan Committee, made after their interview with the witness Carlin in June of 1952, indicate that the report is one which should be made available to the defense on a new trial, in accordance with a realistic interpretation of the provisions of Section 3500.

The affidavit of Jack S. Balaban, the investigator, sworn to April 4, 1958 and attached as Exhibit B to the Government's brief on the appeal from the conviction of the defendants in the District Court which was heard in the Court of Appeals on April 29, 1958 shows clearly that the statement or memorandum which was prepared by Balaban following the interview with Carlin in June of 1952 pertained to the subject matter of Carlin's direct testimony as a witness for the U. S. Government; that it was made at least partially on the basis of oral statements made by Carlin to Balaban and that the statement was prepared or recorded contemporaneously as that word is understood when applied to government investigative procedure. The circumstance that Balaban states in his affidavit that the statement or memorandum is not a substantially verbatim recital of an oral statement by Carlin seems fatuous and lacking in candor. It would be almost impossible to conceive that his report after such an interview would not contain some quotation as to what Carlin had said to him orally.

The Court's attention is invited to the somewhat equivocal language employed by the Court of Appeals in describing the statement after having had the opportunity to read the same. The court stated first that Balaban's affidavit "establishes" that this summary is the only written record made of Carlin's interview and is not a substantially verbatim record of Carlin's statement. In our opinion, Balaban's gratuitous statement to such effect contained in his affidavit "establishes" nothing insofar as determining whether or not this document can be suppressed by the Government on a new trial under the provisions of Section 3500.

After the foregoing reference to Balaban's affidavit, the Court below then stated further:

> "We have examined the summary and *internal evidence* from it *tends* also to bear this out" (emphasis supplied).

It is submitted that if the so-called "internal evidence" from the document simply "tends" to bear out the investigator Balaban's inexpert interpretation of what Congress intended and meant by the term "substantially verbatim recital of an oral statement made by a witness to an agent of the Government" then the defense ought to be entitled to the benefit of the doubt and given the statement together with a new trial.

There can be little doubt but that the Court of Appeals has adopted an unwarrantedly narrow and technical interpretation of Section 3500. It is most significant that nowhere in the opinion of the Court of Appeals can there be discerned any intimation that the statement was not relevant and germane to the testimony adduced on direct examination of the witness or that it was not inconsistent with such testimony.

It is wholly illogical to suppose that Congress intended the hypertechnical and narrow interpretation which the

Court of Appeals has placed upon the term "substantially verbatim recital". According to the avowed intentions of the framers of the legislation, Congress was seeking to prevent a wholesale raid upon the confidential files of the law enforcement and investigative agencies which was feared because of a misconception of the doctrine of the *Jencks* case. It was piously avowed by them that it was not the intention of Congress to "nullify or, to curb or to limit" that decision. Similarly, it was surely not the intention of Congress to invade the sacrosanct territory of "due process" by pointlessly depriving an accused of a fair trial and the full right to impeach his accusers on cross-examination through the use of statements made or signed by the witness himself or otherwise recorded by an investigator. The tests must be what did the witness say to the investigator at that time and did the investigator record all or part of it in some fashion contemporaneously or at or about the same time as the interview. If the remarks of the witness were relevant and tending to be inconsistent and if the investigator's record manifests the same, all or in part, or directly or indirectly, then counsel for the defense should be given the statement for impeachment purposes and to bring out the real truth on cross-examination. In *Berger* v. *United States*, 295 U. S. 78 at page 88, Mr. Justice Sutherland in referring to the Government's status in a criminal prosecution stated:

> "* * * and whose interest, therefore in a criminal prosecution is not that it shall win a case, but that justice shall be done."

The term "substantially verbatim recital of an oral statement" was not employed to prevent or prohibit the attorney for the accused from securing and using records of what the witness himself actually said previously, but to prevent useless and dangerous disclosure and dissemination of the inner files and workings of our trusted law enforcement agencies. Any other interpretation would

have the effect of nullifying the statute on the grounds of unconstitutional invasion of the right of due process. It certainly cannot be inferred that Congress intended to make a travesty of the *Jencks* decision and indirectly prohibit that which it purports to confer on the defense by the statute, i.e., the right to the use by the defense on cross-examination of prior statements of Government witnesses, by encouraging overzealous or unscrupulous investigators to phrase their reports so that no statement will fit within the narrow compass of the definitions in Section 3500 as the same has been expounded by the Court of Appeals in its opinion in the case at bar.

The case of *United States* v. *Miller*, 2 Cir., 248 F. 2d 163, certiorari denied *Miller* v. *United States*, 355 U. S. 905, cited by the Court of Appeals in its opinion in support of its interpretation of Section 3500 constitutes no precedent bearing on our problem because the issue was eliminated from the record on appeal by stipulation. In paragraph 2, page 165, the *Per Curiam* opinion states as follows:

> "Hence subdivision (c) of the new statute, 18 U. S. C. § 3486(c), will apply, and it will be the duty of the trial judge to 'excise the portions of such statement which do not relate to the subject matter of the testimony of the witness,' and 'With such material excised, the court shall then direct delivery of the statement to the defendant for his use.' We shall assume that Judge Walsh's failure to follow such procedure was an error but we cannot determine whether or not it was a prejudicial error because the exhibit has by stipulation been excluded from the record on appeal. *Since we cannot know that failure to deliver the statement, properly excised, was prejudicial to the defendant, we do not think a new trial should be ordered.*" (Emphasis supplied)

The Solicitor General of the United States in his brief opposing the granting of certiorari herein cited as authority for the proposition that the trial court's mistake was merely "harmless error", the case of *United States* v. *Sheba*

Bracelets, Inc., 248 F. 2d 134 (C. A. 2) certiorari denied 355 U. S. 904. Here again we have an authority which has very little if anything to do with the issues raised by this appeal. In the *Sheba* case it was clear that there was no inconsistency between the reports and the testimony. In paragraph 8, page 145 the Court's opinion states as follows:

> "It will be recalled that the testimony was that on each of those seventeen days Carroll went through precisely the same movements in the delivery of the gold. It is difficult to see that the use of these reports on cross-examination would have accomplished anything other than a demonstration that Newbrand had written in his reports the same thing to which he testified at the trial."

Again in paragraph (9), page 145 of the same decision, a further reason for invoking the "harmless error" statute is supplied by the court as follows:

> "But it is abundantly clear that any error in refusing to hand them to defense counsel was a harmless one which cannot, under any circumstances, have affected the substantial rights of the defendants. This is so because the evidence of the guilt of the defendants was simply overwhelming. In the six months period April through September, 1951, Carroll on 94 different days purchased approximately 150 ounces of fine gold from the refiners. This was established by the production of 94 end-use certificates, including the two described in the indictment, from the records in the office of Kastenhuber & Lehrfeld."

In the instant case there is no contention asserted that the investigator's recording of the statement of the witness could not be deemed inconsistent and certainly by no stretch of the imagination could it be declared that the evidence of the guilt of the defendants was overwhelming. To the contrary, it is almost unbelievable that twelve men and women could have been found who would vote to destroy the lives

of five people of previously unassailable character and reputation on the basis of the type of testimony which was adduced herein by the prosecution. As has been stated before the length of time during which the jury deliberated, their many requests for instructions and their recommendation of clemency denoted a troubled and doubtful frame of mind.

In *United States* v. *Grunewald*, 162 F. Supp. 621, Judge Herlands of our Southern District of New York seems to embrace the proposition that an investigator's report of previous oral statements of Government witnesses can be quarantined from any use by defense counsel for impeachment purposes on cross-examination through the very simple device of setting it up on department records as an inter-office communication and utilizing the magic words "to" and "from". Such an interpretation would nullify Section 3500 as an invasion of due process. Reference is made by Judge Herlands in his opinion paragraph (2), page 624, to the views expounded by our distinguished Judge Frederick V. P. Bryan in a District Court decision handed down in our companion certiorari case herein. *United States* v. *Palermo*, D. C. S. D. N. Y. 1957, 21 F. R. D. 11, 13-14. Certainly Judge Herlands cannot contend that Judge Bryan intended to assert that experienced defense counsel could not find ways and means to use an investigator's report of a previous oral statement of a Government witness inconsistent with his testimony merely because the paper was not signed by the witness.

In *Bergman* v. *United States*, 253 F. 2d 933, the Court of Appeals for the Sixth Circuit reversed the conviction of the defendant on the basis of the *Jencks* decision in a case substantially the same as the case at bar. The court stated in paragraph (3), page 935 as follows:

> "Several months after the judgments of conviction were entered, the Supreme Court decided Jencks v. United States, 1957, 353 U. S. 657, 77 S. Ct. 1007, 1

> L. Ed. 2d 1103. In that case the Court expressly disapproved the procedure adopted by the district court here. 353 U. S. at page 669, 77 S. Ct. at page 1013. In the light of the Jencks decision, the failure of the district court to make Chitwood's prior statement available to the defense requires that the judgments be set aside. We reach this conclusion with reluctance in view of the likelihood that the failure to make Chitwood's statement available actually worked no prejudice to the defendants, and in view of the generally conscientious and fair conduct of the long and complicated trial by the district judge."

The footnote to Judge Stewart's opinion, page 935, reads as follows:

> "The fact that Chitwood's statement may have been unsigned is immaterial, if it was 'otherwise adopted or approved by him,' or, if orally made, it was a substantially verbatim contemporaneous recording. Jencks v. United States, 353 U. S. at page 668, 77 S. Ct. at page 1013; 18 U. S. C. A. § 3500."

The Court's attention is invited also to *Lohman* v. *United States*, likewise a Sixth Circuit decision which was also written by Mr. Justice Stewart of this Court while a Judge of the Court of Appeals. See also *U. S.* v. *Rosenberg*, U. S. D. C., E. D. Pa., 157 F. Supp. 654.

In conclusion, it should be stated that the general language of Section 3500 presents an extremely difficult problem of interpretation for trial and appeal courts. Section 3500 makes no provision as to how it is to be determined whether a particular document is or is not a "statement" as defined in subsection (e). Moreover, subsection (e) imposes a rigorous definition on the meaning of the word "statement" for production purposes under subsections (b) and (c). On its face, subsection (e) contains numerous words and phrases with vague and indefinite connotations. To begin with, it is first necessary to decide what is "the subject matter as to which the witness has

testified", as provided in subsection (b), before it can be determined whether a "statement" as defined by subsection (e) should be produced pursuant to subsection (b) or subsection (c), as the case may be. Only after it is determined what the "subject matter" is, can it be determined whether a "statement" relates to the "subject matter". But even a "statement" relating to the "subject matter" need be produced only if it meets the requirements of subsection (e). In that determination, these questions present themselves. If the statement is a written statement made by the witness but has not been signed by him, has he otherwise adopted or approved it? If the statement was recorded by a government agent on the basis of an oral statement made by the witness, there are two questions. Is the record "a substantially verbatim recital" of the witness' oral statement? Was it "recorded contemporaneously" with the making of the oral statement? These questions have no simple or obvious answers and reasonable and honest men may differ as to their answers.

III

The Court of Appeals exceeded its authority in accepting and predicating its decision on documents which were not part of the trial record and which contradicted the testimony of the Government's own witness.

It should be understood at the outset that no claim has ever been made that the statement whose suppression at the trial has been approved by the Court of Appeals because of the subsequent enactment of Section 3500, contained irrelevant or extraneous matter. No assertion has ever been forthcoming that there were no inconsistencies between the witness' testimony and the statement. The statement was not perused by the trial court and was never produced at

all until it was submitted to the Court of Appeals in a sealed envelope accompanied by an *ex parte* affidavit of the government investigator characterizing it as not a "substantially verbatim recital of an oral statement made to an agent of the Government." The Trial Judge who had studied and prepared for the trial by a series of pre-trial conferences and otherwise; who had presided over the selection of the jury, listened to the opening statements of counsel and heard and observed the witness closely throughout the direct examination, was the one who should have read the statement and set forth in the record his reasons for whatever decision he felt constrained to render. Instead we have the Court of Appeals perusing the paper in question in conjunction with a document which would have been completely incompetent at the trial, an investigator's affidavit, which amounted in effect to an interpretation by the inexpert investigator as to the significance of the definitive part of Section 3500. Surely defendants' counsel would never have been permitted to add incompetent affidavits to the record on appeal to support its contentions. Can it be that we have now reached a new stage in the evolution of the rules of evidence whereby a different set of standards is to be applied to favor the prosecution at the expense of the defense in criminal trials and appeals?

Clearly the opinion of the Court of Appeals is not susceptible of misunderstanding. It was the incompetent affidavit of the investigator which "established" that the report is not a "substantially verbatim" record of Carlin's statement (R. 85). The summary itself "*tends also* to bear this out" (emphasis supplied).

It is especially significant for this Court to fully comprehend just exactly what did transpire during the cross-examination of the witness Carlin by defendant Rubin's counsel. The witness was asked "when is the first time you gave a statement to any Government agency concerning the events that you testified to here this morning." The

District Attorney promptly objected on the grounds that no foundation had been shown even to ask the question (R. 45) and he was overruled. Then the witness stated in response to further questioning by Mr. Sullivan that he had given a statement concerning the events to which he had testified to the Senate investigators Balaban and Poole and he said he believed he had signed a statement (R. 46).

Immediately thereafter request was made for the production of the statement (R. 46). It should be carefully noted that what was requested was a statement signed by the witness Carlin which counsel had every right to believe existed by virtue of Carlin's responses to his questions. It is most significant that the District Attorney did not state that he was unaware of the existence of such a document; he merely objected on the ground that "no proper foundation" had been established (R. 46). In his affidavit which was submitted to the Court of Appeals together with the sealed summary and the affidavit of investigator Balaban, referring to the demand for the statement, he stated as follows:

> "At the time such demand was made, your deponent did not have in his possession any signed statement by witness Carlin nor any report of an interview of Carlin by Senate investigators: nor was your deponent aware that there was in existence either a signed statement or a report of an interview." (R. 75)

Thereafter Mr. Sullivan again sought the production of the statement which he believed and had every reason to believe was in being and reposing in the prosecution's file and the court delivered itself of his conception of the rights of the defense to such statements which we now know was definitely erroneous under the *Jencks* case at least (R. 74).

If the prosecutor had advised the court and Rubin's counsel that he had no such statement as the one which the witness had testified he gave and signed to agents Balaban and Poole, then resort would have been had to ques-

tioning further government witnesses as to other prior statements to at least secure a clean cut decision on the issue from the Trial Judge. Counsel was surely justified in believing that he had been given just that clean cut decision to which he was entitled. He could not have continually plagued the court with identical requests for the ruling which he had already received—a most definite and unequivocal ruling with no strings attached and susceptible of no misunderstanding.

Now by virtue of the avoidance of the issue, to some extent, by the prosecutor by his having argued the proposition as if a signed statement existed, when according to his affidavit he knew of no such document, the defendant Rubin finds himself in the position of having been deprived of his right to the production of prior statements of Government witnesses during the trial and also deprived of his right to a judicial review of the trial court's ruling on appeal because of a legerdemain so to speak. In effect, the Court of Appeals says—you thought you had a ruling on the issue but you really did not because what you thought was there was really not there. Since it was affirmative Governmental action, whether intentional or unintentional which constructed and produced the trap—the completely unfair predicament into which Rubin and his lawyer fell, it is earnestly urged that on these grounds alone a new trial should be ordered as to the defendant Rubin. He was in effect deprived of a fair trial according to due process of law, according to the rule of the *Jencks* case and according to the provisions of Section 3500; then to cap the climax he finds that he has been maneuvered out of a straightforward decision on appeal as to his right to a fair trial under the Sixth Amendment to the Federal Constitution, with full rights of confrontation and cross-examination. In no way did he or his counsel contribute negligently or otherwise to the kettle of fish from which he is now attempting to extricate himself in this court.

In fairness it must be stated that under no circumstances is there any implication intended that Mr. Arthur Christy, the prosecutor planned or deliberately created the unhappy situation which has arisen in this connection.

The rule of law that an appellate court may, on appeal, consider documents which are not part of the record of a trial is carefully limited in its scope. The rule is definite and clear that only *incontrovertible documents may be so received.* (*O'Connor-Sullivan, Inc.* v. *Otto*, 283 App. Div. 269, 127 N. Y. S. 2d 373 at page 377; Vol. 6 Carmody's New York Practice Sec. 316; *Latourelle* v. *New York Central Railroad Company*, 275 App. Div. 123, 89 N. Y. 2d 296.)

In *Stemmler* v. *The Mayor of New York*, 176 N. Y. 476 at page 483, the rule is limited to the reception of record evidence. *People ex rel. Warschauer* v. *Dalton*, 159 N. Y. 235, 239; *Wines* v. *Mayor, etc. of N. Y.*, 70 N. Y. 613; *Matter of Cooper*, 93 N. Y. 507; *Day* v. *Town of New Lots*, 107 N. Y. 148; *Dunham* v. *Townsend*, 118 N. Y. 281; *Atlantic Ave. R. R. Co.* v. *Johnson*, 134 N. Y. 375.

The public documents such as deeds or mortgages or records of a permanent public office engaged in a usual routine of business would appear to be the type of document permitted to be perused under the holdings of the cases. Certainly the summary and the affidavit described by the Court of Appeals in its opinion fall far short of any compliance with these standards. The Senate Committee is not in any sense a permanent continuing body of the nature of a County Clerk. Furthermore, only an ostrich could immunize itself from the unvarnished truth that the chairman, counsel and investigators of the Committee are not disinterested parties. In fact, the Committee's counsel has on occasion expressed criticism of the Attorney General of the United States for his failure to indict and convict on cases referred to him by them. They want convictions to support their proceedings and pronouncements.

The Court of Appeals clearly had no right under the rule to consider the summary and the affidavit submitted to them by the U. S. Attorney in their deliberations. Many unwarranted inferences and conclusions must necessarily be implied and speculated upon from these documents before the sworn testimony of the Government witness is overcome and the conclusions of the Court of Appeals that the summary is the only written record of Carlin's interview and would not be discoverable under the new statute, can be accepted.

IV

The Court of Appeals erred in completely disregarding petitioner's contention that the trial court's erroneous ruling on the production of previous statements limited the cross-examination as to all subsequent witnesses.

In announcing its ruling that counsel for the defendants would have to demonstrate something inconsistent between the testimony of the Government witness and the statement sought to be produced before he would as much as read the statement for which request was made, the trial court shackled defense counsel with chains and irons from which no escape was possible. How were they to be expected to point out an inconsistency in a paper they had not seen and could not see? The proposition is exceptionally well stated in the *Jencks* case at pages 667 and 668:

> "Requiring the accused first to show conflict between the reports and the testimony is actually to deny the accused evidence relevant and material to his defense. The occasion for determining a conflict cannot arise until after the witness has testified, and unless he admits conflict, as in Gordon, the accused is helpless to know or discover conflict without inspecting the reports. A requirement of a showing

> of conflict would be clearly incompatible with our standards for the administration of criminal justice in the federal courts and must therefore be rejected."

We were completely and effectively foreclosed from even referring to previous statements on cross-examination of all Government witnesses. If we were to ask whether the witness had given any prior statement and receive an affirmative response, our only recourse at such a point would be to inquire whether such a statement was inconsistent with the testimony which had been given. Inasmuch as we could not possibly anticipate a response that it was inconsistent it surely would have been foolhardy for any of us to thus assist the prosecution in the conviction of the defendants. To have asked such questions in the face of the sweeping nature of the ruling which had been imposed upon us would have been quixotic and unwise. Moreover, we had already suffered in the estimation of the Jury by having our earnest request and argument disposed of so completely and adversely. Repeated and subsequent requests might very well have been interpreted as contumacious and disrespectful to the court.

There can be no doubt whatsoever but that trial court's erroneous ruling permeated and tainted the entire trial with error and injustice from the moment it was made down to the last word of testimony of the final witness. The limitation of confrontation and cross-examination which was thereby accomplished in the prosecution's behalf by the trial court was devastating to the hopes we had nurtured of impeaching the Government witnesses and extracting the real truth from their own lips through the medium of the numerous and conflicting statements, we had reason to believe had been supplied by these self-confessed criminals and perjurors to the various Government agencies which had come into the matter after the initial burst of notoriety and publicity supplied by the McClellan Committee in its first real production over the television cameras.

On a new trial, the Government would be forced to produce, for the trial court's inspection and for use by defense counsel, previous statements made by the two principal witnesses, Leon Levy and Joseph Porreca. Levy, the unindicted, self-confessed criminal, undoubtedly gave many statements to federal law enforcement agencies. Porreca, the chief inspector who bought his freedom from incarceration by his testimony, may very well have purchased his emancipation from many other prosecutions by his testimony if the truth could be brought out on cross-examination. He had the effrontery to testify that although he has supervised numerous other contracts as to the vital inspection and acceptance, this was the only time he ever received anything. Furthermore on a new trial, the Government would be forced to produce the full minutes of the closed sessions of the Senate Committee and the full text of the Arabic diaries which were not given to defense counsel at the trial.

In *Elenkrieg* v. *Siebrecht*, 238 N. Y. 254, 263; 144 N. E. 519, the late Chief Judge Frederick Crane of the Court of Appeals of New York stated:

> "It was not necessary for the defendant's counsel to except to the judge's charge in order to preserve the force and effect of his exception taken to the denial of his motion made at the end of the case. * * * One exception upon the same ruling was as good as two."

See also *Stephens* v. *Ely*, 162 N. Y. 79; 56 N. E. 499. Note: Need not repeat same objection. *Church* v. *Howard*, 79 N. Y. 415, 421; per Miller, J. See *Sherman* v. *Delaware etc.*, 106 N. Y. 542; 13 N. E. 616.

In *Kansas City Southern Ry. Co.* v. *Jones*, 241 U. S. 181, 183; Mr. Justice McReynolds stated as follows:

> "In such circumstances it was unnecessary to go through the idle form of articulating the obvious. If timely objection upon the ground ultimately suggested by the Supreme Court had been sustained, it could have been easily obviated. * * * "

In *Brettman* v. *Braun*, 37 Ill. App. 17, 18, Gary, P. J. used the following language:

> "It is not really necessary that the court shall commit the same error more than once in the same case, to bring it before a court of appellate jurisdiction for review."

If the Court of Appeals saw fit to read and consider the prior statement of Carlin which was not marked as an exhibit or even brought into court, as the affidavit of the prosecutor affirms, and to also read and give weight to the wholly incompetent affidavit of investigator Balaban, why did it stop at this point? As a logical extension of such appellate procedure, the Court of Appeals might very well have sought out, with the assistance of the prosecution, all prior statements given to all Government agencies by all the Government witnesses who undoubtedly would have been interrogated as to their previous statements but for the trial court's erroneous ruling. Thereafter an effort could have been made by the Court of Appeals to determine relevance and possibly inconsistencies with trial testimony to ascertain whether the prior statements could be deemed to be discoverable under Section 3500 on a new trial.

Such unorthodox activity on the part of the distinguished jurists who adorn the United States Court of Appeals for the Second Circuit is of course unthinkable. It is merely projected to spotlight the complete unfairness to the defendants of the proceedings which the Court of Appeals adopted in accepting and considering the incompetent affidavit of Balaban as evidence in determining an appeal which involved the lives and freedom of five citizens of previously unassailable honor and integrity. Perhaps we must take some short cuts in dispensing justice in this changing world, on matters relating to property, money or other forms of wealth but never where the honor and freedom of the individual citizen is concerned.

V

Title 18, U. S. C., Section 3500 is unconstitutional on its face and as interpreted by the Court of Appeals herein.

As a consequence of a general misapprehension of the rule announced by this Court in the *Jencks* case and because of incorrect and distorted public exposition of the doctrine by individuals who might have been expected to know better, there was rushed through the national legislature the statute designated as Section 3500 Title 18 U. S. C.

Subsection (a) provides that no statement or report in the possession of the United States which was made by a Government witness or a prospective Government witness shall be the subject of a subpoena, discovery or inspection until the said witness has testified on direct examination in the trial of the case.

Subsection (b) provides for the turning over of such statements providing they conform to the definition of Subsection (e) and are relevant to the subject matter of the testimony in their entirety. Subsection (c) provides machinery for inspection of the statement by the court, if the prosecutor refuses to turn over the statement on the grounds of total or partial irrelevancy and for the excising by the court of such parts as it deems are in fact irrelevant. Subsection (d) permits the court to either strike from the record the testimony of the witness or to declare a mistrial if the Government declines to produce and deliver over the statement.

A. Subsections (c) and (e) of Section 3500 Violate Due Process.

Subsection (c) modifies the rule in *Jencks* by providing that if the prosecution claims that a statement of a witness "contains matter which does not relate to the subject mat-

ter" of his testimony, the statement shall be produced to the court *in camera* instead of directly to the accused. *Jencks* did not define what is a "statement" or "report" of a witness. Subsection (e) defines "statement" in a restricted, arbitrary, and unreasonable manner. If it is a written statement of the witness, subsection (e) requires it to be "signed or otherwise adopted or approved" by him. If the witness made an oral statement to an agent of the government, subsection (e) requires that the recording or transcription be "a substantially verbatim recital" of the witness' oral statement and that it must have been "recorded contemporaneously with the making of such oral statement".

1. Whether the procedure set forth in subsection (e) violates due process turns on the interpretation of the *Jencks* decision. If the basis of the decision is due process, then subsection (e) violates due process.

In *United States* v. *Spangelet*, 27 L. W. 2063, the Second Circuit has recently held that *Jencks* does not rest on due process, but is an exercise of the supervisory power of the Supreme Court over the administration of justice in the federal courts. *McNabb* v. *United States*, 318 U. S. 332, 340-342. Unfortunately, the opinion in *Spangelet* deals with the problem in cursory fashion, saying only that the Court finds "no indication in *Jencks* that the standards it set forth were constitutionally required" (*ibid.*).

We believe, however, that *Jencks* does rest on due process considerations. The opinion does not refer to the *McNabb* doctrine at all. Aside from that, examination of the opinion in *Jencks* shows that the conclusion in the case stemmed from the Court's conceptions of fair play and elementary justice. "Justice requires no less" than to permit the accused "to inspect the reports", 353 U. S. at 668-669. It is "unconscionable", said the Court, quoting the *Reynolds* case, 345 U. S. 1, 12, for the government to prosecute and "then invoke its governmental privileges to

deprive the accused of anything which might be material to his defense. * * * ", 353 U. S. at 670-671. In his dissent, Mr. Justice Clark makes the derisive comment that what the majority has done, has been done: "All in the name of justice", 353 U. S. at 682. The Court of Appeals for the District of Columbia Circuit rested its conclusion in *Communist Party* v. *Subversive Activities Control Board*, 254 F. 2d 314, that *Jencks* applies to administrative proceedings on "simple justice" and "the fundamentals of fair play" (at 328):

> "We think simple justice, the fundamentals of fair play, require no less. The opinion of the Supreme Court in the *Jencks* case, as we read it, is based upon the elementary proposition that the interest of the United States is that justice be done."

Procedural due process "is a conception of fundamental justice". *Foster* v. *Illinois*, 332 U. S. 134, 137. Cf. *Rochin* v. *California*, 342 U. S. 165, 173. Due process bars Congress from enacting laws "that shock the sense of fair play —which is the essence of due process. * * * " *Galvan* v. *Press*, 347 U. S. 522, 530. If "justice requires no less" than the procedure proscribed in *Jencks*, subsection (c) violates due process.

2. The opinion in *Jencks* does not define "report" or "statement". The opinion does, however, describe what should have been produced in that case:

> "We now hold that the petitioner was entitled to an order directing the Government to produce for inspection all reports of Matusow and Ford in its possession, written and, when orally made, as recorded by the F.B.I., touching on the events and activities as to which they testified at the trial." (353 U. S. at 668)

In any event, this is a problem which, under the circumstances of the case, was moot in *Jencks* because it was

obvious that the statements in question were relevant and the Court needed to address itself only to the problem which was presented, the problem of production.

Whether or not *Jencks* is based on due process, the limitations imposed by subsection (e) of Section 3500 do violate due process. The definition of a "statement" in subsection (e) is arbitrary and irrational. If the witness wrote the statement, it should be available for impeachment. It is immaterial whether the witness signed it or otherwise adopted or approved it. That is a matter to be ruled on by the trial court when the statement is used for impeachment, or for explanation by the witness, if explanation is required, or for re-direct examination.

Insofar as a record of an oral statement of the witness to a government agent is concerned, it is also immaterial whether it is "a substantially verbatim recital". Here again, this is a matter to be dealt with on cross and re-direct examination. If only "a substantially verbatim recital" were competent otherwise, then direct testimony of a witness on a trial would be incompetent unless the witness could give "a substantially verbatim recital" of the events about which he is testifying, and most witnesses could not take the stand at all.

Subsection (e) is based on the further presumption that an oral statement is competent for impeachment purposes only if it was "recorded contemporaneously". If this were so, then the direct testimony of a police officer or government agent, from memory, as to what the accused or another person told him at the time of the crime or at some other time in the past would never be competent, and a common form of proof in criminal cases would be barred. Here again, the only rational way of dealing with the matter is the traditional one—by examination of the witness.

The basic premise on which subsection (e) rests is thus mistaken. It treats the production of statements made by

the witnesses as if they were to be produced for introduction into evidence as such, that is, as if they need to be as sufficiently authentic as, for example, in the case of past recollection recorded, *United States* v. *Riccardi*, 174 F. 2d 883, 887 (3rd Cir.), or as in the case of the Federal Shop Book Rule, Title 28, U. S. C. A., Section 1732. But the statements are not primarily for introduction into evidence but for use by counsel—if such use they seem to have—in seeking to impeach the witness. Whether they are eventually introduced in evidence depends upon the course of the interrogation and their introduction then does not turn on the degree of their authenticity. Consequently, the degree to which the statements are authentic is immaterial. All that is needed for production is some indication that the witness made the statement and that it relates to the subject matter. Whether it is used for impeachment and then for introduction in evidence does not turn on authenticity along the lines set forth in subsection (e).

Thus, for example, if the defense should happen to have a letter the witness wrote to a friend or a copy of a report made by a private investigator on the basis of an oral statement made by the witness, there is no question that the letter or the report could be used for impeachment if it seemed to have value in that respect, even if the letter were unsigned or the investigator's report were not a substantially verbatim account of what the witness had said and had not been recorded contemporaneously. The witness could of course deny writing the letter or making the statement, or he could question the accuracy, completeness, or authenticity of the documents, or he could make any other explanation or disclaimer if such were necessary. These are all matters for trial in the conventional way, as we have said, but complete authenticity of the letter or report would not have to be fully established before they were available for impeachment.

Furthermore, under the rule prior to *Jencks* and the rule unaffected by Section 3500, if such a letter or report

happened to be in the possession of the prosecution it would have to be produced on motion of the accused since Section 3500 applies only to statements made to government agents. But if the letter had been written to a government agent or the record of the witness' oral statement had been made by a government agent, production would be denied if the material did not meet the standards fixed in subsection (e).

What Congress has done in subsection (e), then, is to place statements made to government agents in a special category and to impose several technical limitations upon their use without any apparent reason except the mere fact that they were made to agents of the government. The standards fixed in subsection (e) have no relation to proper use of the statements for evidentiary purposes, to any policy of secrecy, or to any policy relating to the practical or other needs of the government or its agents. The standards in subsection (e) meet no legitimate purpose. Subsection (e) thus has no rational foundation. It is an arbitrary limitation on the right of cross-examination.

3. Congress has the power to regulate the rules of evidence in the federal courts, but the power, like all legislative power, is subject to due process. *Tot* v. *United States*, 319 U. S. 463; *Benton* v. *United States*, 232 F. 2d 341 (C. A. D. C.). The arbitrary, irrational, and unfair barriers in the path of the right of impeachment erected by subsections (c) and (e) of Section 3500 violate due process. "Confrontation and cross-examination under oath are essential, if the American ideal of due process is to remain a vital force in our public life." Mr. Justice Douglas, concurring, *Peters* v. *Hobby*, 349 U. S. 331, 351. There is no reasonable basis for the deep inroads which subsections (c) and (e) make on these essentials of a fair trial. "Mere legislative fiat" cannot be substituted for the right of the accused to defend himself in a criminal case. *Manley* v. *Georgia*, 279 U. S. 1, 6.

VI

Section 3500 is *ex post facto* legislation as applied to appellant.

1. Even if Section 3500 is otherwise constitutional, its application in this case violates the prohibition against *ex post facto* legislation contained in the Constitution, Art. I, Sec. 9, because the alleged crimes were committed before its enactment.

In *United States* v. *Papworth*, 156 F. Supp. 842 (N. D. Texas), the Court held that Section 3500 is not *ex post facto* legislation because it effects a procedural change and not a change in substantive law. But this is not what distinguishes *ex post facto* legislation. It has been clear ever since *Calder* v. *Bull*, 3 Dall. 383, that a change in procedure, whether it be in the law of evidence or otherwise, may run afoul of the *ex post facto* prohibition. One of the four types of legislation which Mr. Justice Chase included in what is the original definition of *ex post facto* laws under the Constitution is a statute which alters the legal rules of evidence. 3 Dall. at 390. And every leading case since *Calder* v. *Bull* has made it quite clear that the distinction is not between procedural and substantive changes, but between changes which affect the accused to his "substantial disadvantage" and those which do not. *Lindsey* v. *Washington*, 301 U. S. 397, 401-402. See also, *American Publishing Co.* v. *Fisher*, 164 U. S. 464; *Thompson* v. *Missouri*, 171 U. S. 380, 387-388; *Beazell* v. *Ohio*, 269 U. S. 167, 170; *Putty* v. *United States*, 220 F. 2d 473 (9th Cir.).

The question then is, as put in the *Beazell* case, *ib.*, whether Section 3500 operates "in a limited and unsubstantial manner" to the disadvantage of the accused. If it does, it is not *ex post facto* legislation. If, however, it does operate to the substantial disadvantage of the accused, it is an *ex post facto* law.

2. It is submitted that the changes in the *Jencks* rule effected by subsections (c) and (e) of Section 3500 are substantial and that this case is a vivid illustration of this conclusion.

As far as subsection (c) is concerned, this was not a case where the determination of relevancy could as easily be made by the trial judge as by the defence. The opinion in *Jencks* points out that even in the ordinary case, "only the defense is adequately equipped to determine the effective use for purpose of discrediting the Government's witness and thereby furthering the accused's defense" and that this is why "the defense must initially be entitled to see [the reports] to determine what use may be made of them". 353 U. S. at 668-669. But this was not the ordinary case, in the sense that the problem of determining relevancy and possible inconsistency or contradiction was presented in narrow compass, as in comparing limited direct testimony dealing with a single event with only one prior statement of the witness. Even in such a case, the trial judge may overlook an obvious inconsistency or contradiction, as the trial judge did, for example, in the *Spangelet* case, 27 L. W. 2063, in comparing the witness' grand jury testimony with his trial testimony. In the instant case, the problem was considerably more complex and subtle. The witnesses Carlin, Levy and Porreca did not testify merely to one or two events or to events involving physical activities, as in *Spangelet* and as in most criminal cases. Here, the witnesses testified mostly to conversations. Thus a change in a single word or phrase in the testimony of one of the witnesses relating to one of the conversations with appellant could give the testimony an entirely different connotation, could give an incriminating meaning to an innocent comment. In such a case, then, the observation in *Jencks* that only the defense is adequately equipped to determine what is useful for purposes of impeachment is peculiarly *a propos*. In such a case, the

difference between having the trial judge examine the statements and permitting the defense to do so may well be the difference between ineffectual impeachment, on the one hand, and discrediting the witness entirely, on the other.

As far as subsection (e) is concerned, we think the case is even clearer. Under *Jencks*, appellant was entitled to *any* statement of the witnesses "touching the events and activities as to which they testified at the trial." In this case, subsection (e) had the effect of depriving appellant of material for impeachment, if, for example, it consisted of written statements of the witness which he had not signed or had not otherwise adopted or approved; or of oral statements made to government agents which were not "substantially verbatim" recitals or which had not been "recorded contemporaneously" by the agents. Without subsection (e), the prosecution would have been required to produce such statements even if they had not met these conditions, with the right to object if the statements were incompetent for impeachment on these or any other grounds. Subsection (e) deprived appellant of a substantial advantage which was available to him prior to its enactment.

3. Statutes changing particular rules of evidence have been held not to be *ex post facto* where the change is not substantial, as in *Thompson* v. *Missouri*, 171 U. S. 380, but have been held to violate the constitutional prohibition where the change makes conviction easier, as in *Frisby* v. *United States*, 38 App. D. C. 22; *Hart* v. *State*, 40 Ala. 32, and *Parker* v. *Commonwealth*, 139 Va. 585, 123 S. E. 360. But as far as we have been able to determine, there is no case passing on a problem similar to the one posed by subsection (c) of Section 3500, which does not make a change in a rule relating to the admissibility of evidence but changes the procedure whereby the accused may have access to material for impeachment purposes.

As we have said, the question is whether subsection (c) changed the situation to the substantial disadvantage of appellant. It may be that in most cases this would not be so, although the *Spangelet* case casts doubt on such a generalization. But in a case like this, where the credibility of the witnesses assumes such importance and where the use of the materials for impeachment is a complicated and difficult task, to deprive the accused of direct access to such materials is to deprive him of a substantial advantage.

Subsection (e) of Section 3500 has even more obvious effect than subsection (c). It quarantines material which was available to the accused under *Jencks* and prior cases. Even under pre-*Jencks* procedure whereby the statement of a witness was produced preliminarily to the trial judge for determination as to whether it contradicted the witness' trial testimony, the accused was entitled to the statement for impeachment purposes whether or not the witness had signed or adopted or approved it or, in the case of a record made by a government agent, whether or not it was a substantially verbatim account of what the witness had said and whether or not it had been recorded contemporaneously. Subsection (e), in other words, declares that material of a certain character is no longer available for use in cross-examination to test credibility. This is a substantial deprivation.

It is respectfully submitted that the very nature and character of the bitterness and invective with which the announcement of the decision in the *Jencks* case was greeted throughout the nation, and the sources from which the same emanated, supplies a definite indication that the *Jencks* doctrine is not considered to be a mere rule of Federal procedure by its very realistic critics but may constitute on the contrary the initiation of a trend to place judicial check reins on the extra-constitutional tendencies of ambitious investigating bodies and overzealous prosecutors.

The rule of the *Jencks* case clearly and conclusively involves the constitutional rights of defendants in criminal cases and is not a rule of mere procedure.

CONCLUSION

The decision below must be reversed and a new trial granted.

Respectfully submitted,

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